In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-807

JOHN E. ROMEO AND BEVERLY C. ROMEO,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the Court's attention to the following facts, which show that the petition for a writ of certiorari was untimely.

The judgment of the court of appeals was entered on July 7, 1972,[1] and since no petition for rehearing was filed, the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on

[1] A copy of the judgment is included in the certified transcript of record on file in this Court. As petitioners recognize (Pet. 3) the judgment was entered on July 7, 1972. The judgment also states that it was "Issued as Mandate" on July 31, 1972, but under 28 U.S.C. 2101(c) the time for filing a petition for certiorari runs from "the entry of [the] judgment or decree," not its issuance as the mandate.

October 5, 1972. One day later, on October 6, 1972, petitioners filed an application for an extension of time in which to file a petition for a writ of certiorari. By order of October 10, 1972, Mr. Justice Powell extended the time in which to file a petition to December 4, 1972, "without prejudice to the Court's consideration of whether the application has been filed in time." The petition was filed on December 2, 1972.

Under 28 U.S.C. 2101(c), a Justice of this Court "may extend the time for applying for a writ of certiorari for a period not exceeding 60 days." Rule 34(2) of the Rules of this Court provides that "Whenever any justice of this court * * * is empowered by law * * * to extend the time within which a party may petition for a writ of certiorari * * * and application seeking such extension must be presented to the clerk within the period sought to be extended." Petitioners did not comply with this requirement, since their application for an extension was not filed until after "the period sought to be extended" had expired, and they have offered no justification for their failure to do so. Since the application was not timely filed, there has been no valid extension of the 90-day statutory time for petitioning and the petition for certiorari was untimely.

2. In any event, for the reasons given by the court of appeals, on whose opinion we rely, the district court correctly dismissed petitioners' suit. That ruling presents nothing warranting further review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973